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**CORPORATION COURT FOR THE CITY OF LYNCHBURG,
VIRGINIA.**

E. L. BELL AND OTHERS V. MARY F. JONES AND OTHERS.

1. **ADOPTED CHILD**—*Status before court.* A child adopted under the Virginia statute is conclusively presumed to be the lawful child of the adopting parent in all litigation in which it may be involved, except in a suit specifically brought to set aside and annul such adoption. The truth of an allegation that such adoption is invalid and void, made in a collateral suit, is not taken as admitted on demurrer.
2. **WILLS**—*Code of Virginia, sections 2544, 2577 and 2614a, Pollard's Supplement*—*Adopted child and subsequent will*—*Rights of next of kin and of legatees under former will.* The rights of the next of kin of testator, and of legatees under a former and alleged valid will to contest a will which has been admitted to probate, are not taken away by the adoption of a child by testator subsequent to the former and prior to the later will. Under Code, sec. 2577, concerning pretermitted children, the legatees under the first will have an interest contingent upon the adopted child dying under the age of twenty-one years, unmarried and without issue, and under the adoption statute (*Pollard's Sup.* sec. 2614a) the next of kin of the adopting parent are entitled to an interest in the estate, or such of it as may remain undisposed of upon the death of the adopted child without issue. In the case at bar, the child being under age and unmarried and without issue, both legatees and next of kin have interests within the meaning of Code, sec. 2544.
3. **PARTIES TO ISSUE DEVISAVIT VEL NON.** In a suit to test the validity of a will which has been admitted to probate all parties having interests under or against the will, and legatees under a former and alleged valid will and the next of kin by blood of the testator, who had adopted a child between the making of the two wills, are proper parties, and a motion to abate the suit as to certain parties under Code, sec. 3263, will be overruled.
4. **CHANCERY PRACTICE**—*Two related suits between same parties*—*Order of trials*—*Case at bar.* Where two suits between the same parties are pending in the same court, in one of which the next of kin of a testator and certain legatees under a former and alleged valid will seek to set aside as void the adoption of a child by testator, and in the other seek to set aside the probated will of the adopting parent made shortly after the adoption, by which will the entire estate of the adopting parent and testator is disposed of, the suit contesting the will must first be tried. Until such will is set aside such legatees and next of kin have no standing in court to proceed with the suit to set aside the adoption.

Caskie & Coleman, Wilson & Manson, Horsley, Blackford & Kemp and Lee & Howard, for plaintiffs.

John H. Lewis and L. D. Lewis, Harrison & Long and Daniel & Harper, for defendant.

Henry A. Minor, Jr., for infant adopted child.

Counsel for Mrs. Jones did not insist on the demurrer in this case, but conceded that it must be overruled. They contended, however, that, in view of the nature of the interest asserted by the contestants, the suit ought to abate as to certain parties defendant, who did not have the same interest, and, according to the allegations of the bill, had in fact no interest in the subject matter of the suit. The motion to abate was based on this objection. Their effort to have the adoption suit tried first was for the purpose of having the status and interests of the parties defined before the issue in respect to the will should be tried ; and, though it was conceded that this was a matter within the discretion of the court, it was submitted that there were strong considerations of right and justice in favor of this order of trial.

FRANK P. CHRISTIAN, Judge :

The following are the facts material to the decision of the questions now before the court. At the June term, 1902, of this court George M. Jones and wife, who were childless, adopted a child by the name of Mae Lillie Jones, which child is now about ten years of age. A few days after the decree of adoption aforesaid was entered, the said George M. Jones executed a will dated the 18th day of June, 1902, which will was admitted to probate in this court at its September term, 1903, the said Jones having died in the month of August preceding said probate.

Previous to the execution of the probated will and the adoption of the child aforesaid, to-wit, in 1892, George M. Jones had made another will. Shortly after the will of June, 1902, was probated, some of the legatees under the will of 1892 and next of kin by blood of George M. Jones brought a suit in this court under section 2545 Va. Code, 1887, to contest the validity of said probated will and also a suit to annul the adoption proceedings of Mae Lillie Jones upon the ground of fraud and imposition ; practically

alleging that the will of 1902 and the adoption aforesaid were but means to defeat the real intentions of the said George M. Jones.

The two suits, with the same parties as plaintiffs and defendants, are now before the court on the demurrers of Mary F. Jones, the widow and executrix, and Mae Lillie Jones by her guardian *ad litem*, and the motion to abate the misjoined parties, and the motion to the court to determine the suit attacking the decree of adoption, before the one contesting the will is tried, which two motions are made by said Mary F. Jones.

The demurrers to the bill in the will suit raise practically the same question, to-wit, that the plaintiffs have no such interest as will entitle them to maintain this suit, and will be treated as one.

A correct decision of this objection necessitates a determination of the status of Mae Lillie Jones so far as this (the will suit) is concerned.

The bill alleges the adoption of Mae Lillie Jones, but that the same was secured by fraud and imposition. The demurrer admits the truth of these allegations if the same are legally pleaded, but as the jurisdiction of courts of equity in cases praying an issue of *devisavit vel non* are restricted by statute, and the function of such suit exhausted when the question whether the will is valid or invalid has been decided, therefore said allegations being barely collateral to the objects of this suit, their truth is not admitted, and so far as said suit is concerned, the adoption of Mae Lillie Jones cannot be therein impeached, and the court on this demurrer must consider her adoption valid.

"A judgment of a court fixing the status of a person, rendered in matters where it has jurisdiction and upon the notice required by law, is conclusive as against all collateral attacks by parties or privies," *Brown v. Brown*, 101 Indiana R. 340 ; *Van Metre v. Sankey*, 39 Am. St. R. 197.

Quoad this suit, then, her adoption being valid, and conceding for the purpose of this demurrer that by reason of said adoption she is the heir and distributee of George M. Jones, deceased, can the plaintiffs maintain their suit ? Some of the plaintiffs are legatees under the will of 1892, and all of them are next of kin by blood of George M. Jones.

Section 2544 Va. Code provides that "any person interested" may file such a bill as this, and it is well established that a legatee

under a prior will is such an interested person, and may contest a later will." Enc. Pleading and Practice, Vol. 16, p. 1018, note; *Dower v. Church*, 21 W. Va. 48.

And the adoption of the child does not take away this right, even assuming the full effect of such adoption claimed by the demurrants, because section 2527 Va. Code in regard to a pre-terminated child provides that the will "shall be construed as if the devise and bequests therein had been limited to take effect, in event that the child shall die under the age of twenty-one years, unmarried and without issue." The adopted child is under the age of twenty-one years, unmarried and without issue (which facts the plaintiffs should insert by way of amendment), and the only result of said adoption then is, that the plaintiffs' interests under the will of 1892 are contingent instead of vested.

Further, the next of kin of George M. Jones by the terms of the Virginia adoption statute are entitled to interests in his estate. That statute provides, "but on the decease of such person (the adopting parent) and the subsequent decease of such adopted child without issue, the property of such adopted parent, still undisposed of, shall descend to his or her next of kin, and not to the next of kin of such adopted child." Pollard's Supplement, section 2614 a.

Thus this statute preserves the identity of the deceased parent's property for the purpose of inheritance and distribution among his next of kin, and does not, as the statutes of other States, notably Massachusetts, create the parent's next of kin artificial heirs and distributees of the adopted child, that they may succeed to his property of which the child dies intestate.

These interests of the plaintiffs as legatees under the will of 1892 and as next of kin of George M. Jones, recognized as valuable by the statute law of Virginia, are taken from them by the probated will, and unless asserted within two years from said probate will be forever barred. These interests certainly bring them within the terms of section 2544 as "persons interested."

Nor does the fact that said interests are contingent prevent the plaintiffs from asserting the same in this suit. *Shultz v. Shultz*, 10 Gratt. 366.

The plaintiffs, having interests independent of the adopted child which bring them within the terms of the statute, the fact that

they claim other interests growing out of their relationship and construction of the adoption statute, is no ground for sustaining a demurrer to a bill of this character.

As to the second ground of demurrer assigned by Mrs. Jones, "that fraud and imposition are not sufficiently alleged," it is only necessary to say, that it is settled in Virginia by the case of *Malone v. Hobbs*, 1 Rob. 346, that where the bill shows a legal interest in the plaintiffs, and alleges that the probated will is not the true last will and testament of the decedent, it is sufficient in law.

The court doth therefore overrule the demurrer in the will suit ; and will permit the plaintiffs to amend their bill as above suggested, as no written objection was filed with the demurrer for said omission.

The next question for decision is the motion to abate the suit as to misjoined parties.

"The jurisdiction of a court of probate differs from that of other tribunals in this, that its province is not to ascertain and enforce the rights of property, but to establish, preserve and perpetuate some important muniment of title." *Coalter v. Bryan*, 1 Gratt. 18.

And while this is a suit in equity to test the validity of a will, a muniment of title, which suit is very circumscribed by statute, nevertheless that does not limit the rule of equity, that all persons interested in claiming under or against the muniment of title, which is sought to be invalidated, should be made parties to the suit that all interests may be concluded and an end put to litigation. *Connally v. Connally*, 32 Gratt. 657.

Therefore the plaintiffs and defendants having various interests under or against the probated will, this motion is overruled.

The next point for decision is the motion of Mrs. Jones to compel the plaintiffs to proceed first with their suit to annul the decree of adoption. The issues being so different, the suits cannot be tried together.

The granting or refusing this motion must depend not upon policy or convenience, nor the right of Mrs. Jones to purge herself of the charge of fraud, but the legal rights of the parties. To ascertain these rights, it will be necessary to consider the effect of the judgment of probate and the decree of adoption on each other.

The bill in the adoption case alleges the probate of the will of 1902, as the bill in will case alleges the decree of adoption. In discussing the demurrer to the bill in the will suit, the effect of the decree of adoption has been shown, and it now becomes pertinent to ascertain the result of the judgment probating the will.

"A judgment admitting an instrument to probate either in common form or in solemn form as a last will and testament, or rejecting the same, is conclusive on all the world, until it is vacated by the court or reversed on appeal or avoided in some other mode provided by law : and it cannot be collaterally impeached in the same court or in any other." Enc. P. and P. Vol. 16, p. 1061.

As was said by Judge Burks in *Connally v. Connally*, 32 Gratt. 657: "The admitting a will to probate is a judgment *in rem*, and while the order admitting it to probate is unreversed, it is binding on all parties, whether parties to the proceeding by which it was probated or not." *Dower v. Church*, 21 W. Va. 23 ; *Norvell v. Lessueur*, 33 Gratt. 222.

Therefore the decree of adoption and the judgment of probate are in full force and effect, and both equally free from collateral impeachment.

In order to attack either one directly, some right must inher in the parties plaintiff which is not taken away by the other.

The plaintiffs would have no standing in the adoption case if Mr. Jones were living, because they had no vested right during his life to succeed to his property, nor would they have any standing therein after his death if the will of 1902 proves valid. This principle was invoked and applied in the will suit by the demurrer. If the principle were otherwise, the curious result might appear that parties not entitled to be heard in the adoption case, because no interest of theirs is injuriously affected by the decree of adoption, would have succeeded in obtaining a decree declaring the same to be invalid. Now to illustrate the same principle by the will case. If there were no prior will, and the adopted child were entitled to succeed to all the estate of George M. Jones, if he were intestate, the equally curious result might follow, that parties having no interest in his estate would have succeeded in obtaining a verdict showing that the will should be declared invalid.

In the case of *Fiske v. Pratt*, 31 N. E. R. 716, which is somewhat similar to this, and relied upon by counsel for the defendants to sustain this motion, there was an application of this principle.

That case arose upon a motion to frame issues for the jury on appeals from the Probate Court upon an order admitting a will to probate, and an order dismissing a petition to set aside a decree of adoption for fraud, the adopted son being also devisee under the will. It was held that under the statutes of Massachusetts the adopted son was sole heir and distributee of the parent, and would, in the absence of a will, inherit all of her property ; that only the heir and distributee was entitled to be heard in the will case, and as the next of kin by blood were deprived of their right of succession by the adoption, they could have no standing in the will case until the decree of adoption had been successfully impeached, and therefore the will case would have to await the determination of the adoption case.

Thus by the statutes of Massachusetts the next of kin of the decedent are entitled to inherit his property upon his intestacy, and therefore as such might contest his will, but the adoption of a child took from them entirely those rights, hence as the decree of adoption unimpeached deprived them by law of the right to contest the will, they had a standing in the adoption case to recover this right, and none in the will case at that time. The question in the Massachusetts case is materially different from those before this court both in law and facts. The plaintiffs in these cases claim as legatees under a former will, and are entitled under the Virginia adoption statute to certain contingent rights notwithstanding the adoption of Mae Lillie Jones, which they are deprived of, not by the decree of adoption, but by the probated will in favor of Mrs. Jones ; and these rights give them a clear standing in the will case independent of the validity or invalidity of the said adoption.

It is true that the plaintiffs also make claim as heirs and distributees of Mr. Jones, to establish which they must impeach the decree of adoption ; but if the probated will be valid, they would have no standing in the adoption case, because under that will Mrs. Jones takes practically everything and there would be no property interests outstanding which require the determination of the right of inheritance.

The plaintiffs then have a clear right to maintain the will suit, and no right to proceed in the adoption case, unless it were necessary to give them a standing in the will suit as heirs.

But it may be urged that in order to accomplish the ultimate ends of the plaintiffs, they will have to prevail in the adoption case. That is true. But suppose the court should require the adoption case to be tried first and the plaintiffs prevailed, and subsequently the will case is tried, and the jury find the probated will to be the true last will and testament of George M. Jones, would not a curious spectacle appear, that a court of equity compelled parties to impeach the validity of a decree of adoption when they have no earthly interests infringed thereby ?

On the other hand, if the will case is first determined, and the plaintiffs prevail, and subsequently the adoption case is tried, and the plaintiffs are defeated, they will certainly not have accomplished the entire purpose of their two bills, and the result will be disastrous to the financial interests of Mrs. Jones ; nevertheless, it will be a result in accord with the rules and principles of law.

Therefore, the court is of opinion and doth decide that the will case be first determined. In view of the above opinion, the legal questions in the adoption case, so ably argued by counsel on both sides along with these decided, are not practical at this time and no opinion should be expressed concerning them until the will contest is determined.

A decree may be drawn in accordance with the above opinion.